SO ORDERED.

SIGNED this 19 day of January, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BEMIS CONSTRUCTION, INC.,	)	**Case No. 02-14893**
a Kansas Corporation	)	**Chapter 11**
	)	
Debtor.	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court on the debtor's objection (Dkt. 395) to claim number 72 filed by Floyd Summers, d/b/a Summers Drilling Company, and a motion for summary judgment filed by Mid Continent Casualty Company against Floyd Summers (Dkt. 510 and 511). An evidentiary hearing was held on October 19, 2004 and both matters were taken under advisement.

Nature of Case

On September 8, 2003, Floyd Summers ("Summers") filed a proof of claim in debtor's bankruptcy case in the amount of $66,080.00. Summers's claim arises out of blasting work performed for Bemis on

a road construction project in Oklahoma. Mid Continent Casualty Company ("Mid Continent") bonded the road construction project. In its summary judgment motion against Summers, Mid Continent challenges the timeliness of Summers's claim *under the bond*. It appears that Mid Continent seeks a declaration from this Court that Mid Continent has no liability to Summers under its bond although apparently no pending action, in federal or state court, exists between Summers and Mid Continent.

Summers's proof of claim (Claim no. 72), asserts a claim against Bemis in the amount of $66,080, based upon his understanding of a purported agreement between him and Summers for the work performed. Because Summers's claim is presumed to be valid, Bemis had the obligation to adduce evidence sufficient to rebut the presumption of validity in order to shift the burden of proof to Summers.[1] As is noted below, Bemis did successfully rebut the presumption of validity and the burden shifted to Summers to prove his claim by a preponderance of the evidence.

Jurisdiction

Summers's proof of claim and debtor's objection thereto is a core proceeding over which this Court has jurisdiction.[2] Mid Continent's summary judgment motion is non-core and at best, is a matter that is related to debtor's bankruptcy case. This Court may exercise "related to" jurisdiction unless it decides to abstain from hearing the summary judgment motion.[3] More regarding this Court's jurisdiction over Mid

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[1] Fed. R. Bank. P. 3001(f).

[2] 28 U.S.C. § 157(b)(2)(B); 28 U.S.C. § 1334.

[3] 28 U.S.C. § 157(c)(1); 28 U.S.C. § 1334(c)(1).

Continent's summary judgment motion will be discussed later in this opinion.[4]

Findings of Fact

Bemis is engaged in the road construction business, primarily as a grading contractor on road construction projects in Kansas, Oklahoma and Texas. George Bemis has been the president of Bemis Construction, Inc. since 1970. Blasting work is often required on road projects where rock and boulders must be removed before the road can be built. Bemis hired blasting companies to perform this work on projects that required a large amount of rock blasting and removal. George Bemis estimated that Bemis had used Summers for blasting services 10-20 times on previous projects.

Summers has been a drilling and blasting contractor for the construction and mining industries for 35 years. He also consulted on drilling and blasting. Summers's office was located in Claremore, Oklahoma, approximately 250 miles from the job site involved in this project.

Bemis was awarded the contract on an Oklahoma Department of Transportation ("ODOT") road construction project in Commanche County near Lawton, Oklahoma in 2001. As required on ODOT projects, a Statutory and Payment Bond in the amount of $3,400,717.81 was issued on the project with Bemis, as principal, and Mid Continent, as surety.[5] The ODOT made progress payments to Bemis as the road construction project progressed.

Prior to obtaining the contract, George Bemis contacted Summers by telephone in February 2001 and asked Summers to bid the blasting work on this project. After initially turning Bemis down, Bemis

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[4] The Court views Summers' claim against the bond (*i.e.* Mid Continent) as a distinct issue from Summers' claim against the bankruptcy estate.

[5] The effective date of the Bond was March 12, 2001.

contacted Summers again and obtained Summers's bid. Bemis stated that Summers quoted him a price of $2.48 per cubic yard of rock. According to George Bemis this quote was "all inclusive," and that Bemis would carry the insurance, blasting payroll, and blasting expenses and deduct these expenses from the $2.48 quoted price. If the blasting costs came in under $2.48 per cubic yard, the remainder up to the maximum of $2.48 would be paid to Summers. In addition, Bemis was to supply a laborer, a backhoe/ loader, and a pickup for Summers's use.

According to Summers's version of this first discussion, he told Bemis that for the price of $.50 per cubic yard, he would estimate the cost of the blasting job for Bemis, "assemble a team" to do the blasting, and oversee the work. Summers did not mention the $2.48 quote as testified by Bemis and he was not questioned at trial whether his cost estimate for the job was the $2.48 figure testified to by Bemis.

It is undisputed that there was no discussion between Bemis and Summers regarding payment terms or the method of measuring the quantity of rock. Nor was there any discussion whether the quantity of rock to be measured was the amount of rock removed or the amount of rock blasted. The only written evidence of this telephone call was George Bemis' handwritten note; no writing memorializing an agreement was ever prepared.[6] It appears that the above contract discussions or offer(s) took place in the State of Oklahoma.

In June 2001, shortly after Bemis had been awarded the contract, Bemis called Summers and discussed a possible start date in early July. Summers testified that he met Bemis again at the job site in July and discussed terms. The start of the project was delayed and no further discussions about the blasting

[6] Defendant's Ex. D-N.

job took place between Bemis and Summers until August.

On August 3, 2001, Summers wrote Bemis and purported to set out their agreement regarding the blasting job.[7] Summers described what is essentially a cost plus contract. According to Summers, Bemis would pay Summers $.50 per cubic yard above and beyond Bemis' obligation for blasting costs (*i.e.*, the insurance and liability expenses, labor and materials). At trial, Summers described this $.50 price figure as a consulting fee to oversee the blasting work.

Upon receiving this letter, Bemis called Summers immediately and advised him that this was not their agreement. They met at the job site in August and Bemis advised Summers that he had agreed to pay Summers $2.48 per cubic yard as per Summers's original quote. George Bemis was adamant that the $.50 fee was included in the $2.48 price. If the actual costs and expenses of the job turned out to be less than $2.48, then Summers would receive $.50 per cubic yard up to the $2.48 unit price. Again there were no discussions of the terms of payment or the method of measuring the quantity of rock.

After this August meeting at the job site, Summers commenced blasting. Bemis sent a letter dated September 11, 2001 to Summers setting forth Bemis' understanding of the agreement.[8] Bemis reiterated his position that the blasting job was capped at $2.48 per cubic *meter*.[9] For the first time, Bemis referred to a 5% retainage. Summers contends there was never any discussion about a retainage. If the blasting work came in under the $2.48, an allowance of $.65 per cubic meter was to be paid directly to Summers

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[7] Plaintiff's Ex. 1.

[8] Plaintiff's Ex. 2.

[9] Apparently the reference to cubic meters was in error. Both parties indicated at trial that the unit price was in cubic yards, not cubic meters. The dispute centered on what that unit price was.

with any further amounts remaining to be divided equally between Bemis and Summers. Again, this letter did not mention payment terms or the method to be used for determining the quantity of rock. The letter provided space for Summers to acknowledge and sign this "agreement." Summers refused to sign the letter agreement but continued to blast throughout the month of September.

On October 1, 2001 Summers sent another letter to Bemis setting forth what he described as "changes" to their agreement.[10] Summers reiterated his understanding of the original agreement – that Summers would be paid $.50 per cubic yard to oversee the drilling and blasting and that Bemis would be responsible for all labor, materials and insurance. He refuted that any retainage would apply. There was still no mention of the method for determining the quantity of rock upon which Summers would be paid.

Bemis did not respond to Summers upon receiving the October 1 letter. Apparently at about this same time, Summers suffered a serious heart attack and was hospitalized for by-pass surgery. Although Summers was not personally present at the job site during blasting, he was available by phone and in fairly constant communication with the workers who were doing the drilling and blasting.

Despite the parties' obvious disagreement concerning the terms of the blasting agreement, Summers continued to blast rock on the project and billed Bemis at the rate of $.50 per cubic yard of rock blasted. Even into the spring of 2002, Bemis and Summers continued to disagree on the terms of the blasting job. On March 5, 2002, when Summers was trying to get payment from Bemis on invoices that had been submitted for work to date, he wrote Bemis concerning the amount owed.[11] This letter recognized the $2.48 per cubic yard price quote but added a $.48 per cubic yard fee to be paid to Summers, with any

[10] Plaintiff's Ex. 4.

[11] Defendant's Exhibit D-B.

remaining balance net of costs to be divided equally among Bemis and Summers. By this point in time, Bemis took issue with the quantity of rock that Summers had calculated and it became apparent that the parties were using different methods for measuring the cubic yards.[12]

For each day that blasting took place on the project Summers prepared a blasting report. Summers's first blast report is dated August 27, 2001.[13] The blast reports indicate the location of the blasting, the area blasted, and the quantity of rock *blasted* in cubic yards. Summers sent the blast reports to Bemis as the blasting occurred. From these blast reports, Summers prepared a handwritten summary showing the dates on which rock was blasted, the quantity of rock blasted in each blast report and the total cubic yards.[14] The summary shows that from the first day of blasting, August 27, 2001, to the last day of blasting, June 7, 2002, Summers blasted a total of 237,872 cubic yards of rock.

With regard to the quantity term of the agreement, Bemis testified that he typically paid blasting contractors based upon the amount of rock *removed* from the job site. Bemis relied upon final cross-sections taken by ODOT.[15] Bemis stated that using the cross-sections took into account any irregularity in the topography. Bemis testified that in large blasting jobs such as this project, he always paid based upon the final cross-sections. For his part, Summers testified that he never relied on cross-sections to figure the quantity and in fact had never done a blasting job using the ODOT cross-sections. Summers always

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[12] Defendant's Exhibit D-C.

[13] Plaintiff's Ex. 5.

[14] Plaintiff's Ex. 7.

[15] *See e.g.,* Defendant's Ex. D-A1 and D-A2.

calculated the quantity of rock blasted using the blasting logs.[16]

According to Bemis' calculations based upon the final cross-sections, after converting the quantity from cubic meters to cubic yards, 174,907 cubic yards of rock were removed from the job site.[17] At a unit price of $2.48 per cubic yard (including the $.50 per cubic yard fee to Summers), Bemis calculated the total price of the blasting work to be $433,769.36. However, actual costs and expenses incurred by Bemis on the blasting job totaled $460,377.41 and exceeded the price. In addition, Bemis has already paid Summers $57,856.[18] Thus, Bemis takes the position that it has overpaid Summers some $84,464, the amount in excess of the $2.48 price.[19]

Summers submitted a series of five (5) invoices to Bemis during the blasting job.[20] Each of the

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[16] As explained through testimony at trial, not all rock that is blasted gets cleared or removed from the job site. Typically, the subgrade blast material is left. It depends upon grade and construction specifications as to the amount of rock that is actually removed.

[17] Bemis' calculations included a summary of the cross-sections taken of the west half and east half of the job site. The summary listed the volume of rock in cubic meters. The west half totaled 33,404 cubic meters and the east half totaled 107,729 cubic meters. Allowance for the volume of rock attributable to a foot of overburden and undercut were also listed. *See* Defendant's Ex. D-D. After adjustment for the overburden and undercut, Bemis calculated 133,721 cubic meters of rock removed from blasting and after applying a conversion factor of 1.308, this equaled 174,907 cubic yards. *See* Defendant's Ex. D-E.

[18] Bemis contends that it made **five** payments to Summers by check: three $5,000 payments (Defendant's Ex. D-F, D-G and D-H); a $20,000 payment (Defendant's Ex. D-I); and a final payment of $22,856 (Defendant's Ex. D-J). It appears that these periodic payments by Bemis were based upon a total *volume estimate* of 194,000 cubic yards by Bemis that turned out to be high. *See* Defendant's Ex. D-E.

[19] Defendant's Ex. D-E. *See also* Defendant's Ex. D-M where amount overpaid is calculated as $84,477, the difference from Ex. D-E calculation apparently attributable to rounding of figures.

[20] Summers could not account for one missing invoice dated October 4, 2001 in the amount of $6,381.97. *See* Plaintiff's Ex. 12.

invoices billed Bemis at the rate of $.50 per cubic yard of rock *blasted,* a quantity of 237,872 cubic yards.[21] The invoices totaled $118,936. The invoices were itemized to correspond to the daily blast reports.[22] Bemis did not remit payment to Summers according to the invoices. Summers indicated that it received four payments from Bemis consisting of checks in the amounts of $22,856, $20,000, and two $5,000 payments.[23] The date of Bemis' last payment was April 4, 2002. Thus, Bemis paid a total of $52,856 on the invoiced amount, leaving a balance due, according to Summers's proof of claim, of $66,080.

Bemis' testimony with regard to the manner in which he paid the invoices was confusing at best. At one point Bemis stated that he paid $5,000 as they went along provided Bemis had received progress payments from ODOT and Bemis was within budget. At another point, Bemis stated that he paid on the estimated quantity of rock removed measured by the load count (*i.e.* the truck loads of rock *removed*). And at another point in his testimony, Bemis stated that he compared Summers's blast reports to original cross-sections taken by ODOT and if the quantities were "close," he would make a payment to Summers. In any event, the record before the Court is insufficient to enable it to determine the manner in which Bemis

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[21] *See* Plaintiff's Ex. 8, 9, 10 and 11.

[22] Floyd Summers explained at trial that the daily quantity of rock shown on the invoices did not necessarily match up with the quantity of rock on the daily blast reports because the blast reports did not include individual shot blasts of large boulders and rocks. The invoices were generated from the drill or "dot" pattern reports. The dot pattern reports indicated the number of holes and total footage or depth (depth that holes were drilled) and size of the pattern to calculate the cubic yards blasted using the formula:

$$\frac{\text{burden [distance between rows] x spacing [spacing between holes] x total footage/depth}}{27}$$

See e.g., Plaintiff's Ex. 16, dot pattern report for August 28, 2001.

[23] Plaintiff's Ex. 13 and 14. Summers does not give credit to Bemis for a third $5,000 payment. *See* footnote 18, *supra* and compare Defendant's Ex. D-F, D-G and D-H..

arrived at the amount of the payments to Summers.

Summers admitted on cross-examination by Bemis' counsel that if the actual blasting costs came in under $2.48, Bemis and Summers would divide this amount between them.[24] According to Summers this was an incentive to keep the blasting costs down. Summers estimated that the blasting job could have been done at a cost of $1.30 per cubic yard plus $.50 per cubic yard for consulting, for a total of $1.80 – still under the $2.48 unit price term that Bemis contends was the parties' agreement. Summers offered no evidence, however, to refute the actual blasting costs and expenses incurred by Bemis.

The blasting work was completed in June, 2002 but Bemis failed to pay the full amount of Summers's invoices. By January of 2003, Summers contacted Mid Continent to make a claim on the bond. As was Mid Continent's standard practice, it sent Summers a claim form and requested him to complete the form in thirty days. Mid Continent did not hear back from Summers and sent a second claim form to Summers. Summers completed the form and sent it back to Mid Continent in late March 2003.[25] After obtaining Bemis' response to Summers's claim, Mid Continent issued a denial letter, erroneously believing that work was last performed January 10, 2002 and that Summers's claim against the bond was therefore untimely.[26] A few days later, on April 10, 2003, Mid Continent sent another letter to Summers informing him that after further investigation, an additional blast report was discovered showing work was last performed June 7, 2002, rather than January 10 as previously indicated.[27] Mid Continent advised

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[24] According to George Bemis, ODOT paid Bemis approximately $4.00 per cubic yard for rock removal.

[25] Exhibit E.

[26] Exhibit H.

[27] Exhibit I.

Summers that the bond remained in full force and effect but did not advise Summers that the deadline to file an *action* against the bond was one year from the date work was last performed, or June 7, 2003, or that the claim Summers had submitted was insufficient to proceed on the bond. On August 5, 2003, Mid Continent advised Summers's attorney that the time for bringing an action on the bond had expired and as a result, Mid Continent was denying Summers's claim and its liability under the bond.

Bemis filed this chapter 11 bankruptcy on September 27, 2002. Bemis failed to list Summers as a creditor or schedule the debt and therefore, Summers received no notice of the bankruptcy. Summers filed its proof of claim in this case on September 8, 2003 and Bemis objected, contending that it owed Summers no additional compensation. On October 2, 2003 Summers filed a motion for relief from the stay to pursue its claim against Mid Continent on the bond. Mid Continent objected to Summers's motion for stay relief. The stay relief motion was continued with the claim objection for scheduling and evidentiary hearing.[28] On August 13, 2004, Mid Continent filed a motion for summary judgment against Summers as it pertains to Summers's potential action on the bond.

Conclusions of Law

Debtor's Objection to Summers's Proof of Claim

Summers's proof of claim is prima facie evidence of the validity and amount of its claim.[29] The evidence adduced by Bemis is more than sufficient to place the claim in question, shifting the burden of

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[28] The Court has gone back and listened to the record of the proceedings held November 12, 2003 (Dkt. 411) and January 13, 2004 (Dkt. 450) and contrary to the representations of Mid Continent's counsel at the scheduling conference, Summers' stay relief motion was not denied by the Court when it was first called on the motion docket. Moreover, no order on Summers' stay relief motion was ever entered.

[29] Fed. R. Bankr. P. 3001(f).

going forward back to Summers who had the ultimate burden of persuasion as to the validity and amount of its claim.[30]

The validity and amount of Summers's claim implicates fundamental hornbook law of contracts. Before addressing the contract law, however, this Court must determine which state's substantive law of contracts governs this case, the law of the forum state, Kansas, or Oklahoma. The bankruptcy court applies the choice of law rules of the forum state, Kansas.[31]

Kansas follows the conflicts of law rule of *lex loci contractus*, the law of the state where the contract is made.[32] The Court notes that Oklahoma also applies the *lex loci* rule.[33]

From the evidence presented to the Court, it appears that the purported contract was negotiated and made in Oklahoma. The initial negotiations were had at the job site in Oklahoma. Summers's office was located in Claremore, Oklahoma. Bemis likewise had offices in Oklahoma. There was no indication that in any of the phone calls and correspondence between Summers and Bemis, they were any place other

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[30] *In re Harrison*, 987 F.2d 677, 680 (10th Cir. 1993).

[31] *See In re Charles*, 278 B.R. 216, 220 (Bankr. D. Kan. 2002) (Kansas bankruptcy court applied choice of law rules of forum state to determine whether Oregon or Kansas law governed the substantive issue whether the lease was a true lease.); *In re Integra Realty Resources, Inc.*, 198 B.R. 352, 361 (Bankr. D. Colo. 1996) (Choice of law analysis begins with application of the conflict of law rules of the forum state.).

[32] *Brenner v. Oppenheimer & Co. Inc.*, 273 Kan. 525, 44 P.3d 364 (2002) (Kansas applies the *lex loci* rule to contracts); *Simms v. Metropolitan life Ins. Co.*, 9 Kan. App.2d 640, 685 P.2d 321 (1984) (A contract is "made" where the last act necessary for its formation is performed.)

[33] *Burgess v. State Farm Mut. Auto. Ins. Co.*, 77 P.3d 612 (Okla Civ. App. 2003); 15 OKLA. STAT. ANN. § 162 provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." *See also Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416 (10th Cir. 1985) (where place of performance is not indicated in contract, the law of the place where the contract was made governs its interpretation).

than Oklahoma. Summers performed the blasting work in Oklahoma and Bemis accepted Summers's performance in Oklahoma. Although the terms of Summers's offer are in dispute, the Court concludes that whatever "contract" was made between Summers and Bemis, it was made in Oklahoma. The Court therefore concludes that Oklahoma substantive law governs this contract dispute between Summers and Bemis.

As can be seen from the findings of fact, there is very little agreement about the substance of the offers made and countered by the parties. Under Oklahoma law, there must be mutual consent, or a meeting of the minds on all essential terms in order to have a valid contract.[34] Consent is not mutual unless the parties all agree upon the same thing in the same sense.[35] Price is an essential term upon which there must be a meeting of the minds before a contract can exist.[36]

Summers failed to prove a meeting of the minds on the price for the blasting work and therefore no contract existed. Indeed, the parties' testimony revealed that there was not even an agreement as to Summers's initial bid. Bemis maintained that the bid price was an "all inclusive" $2.48 per cubic yard of rock. Summers contended that his fee was $.50 per cubic yard of rock, above and beyond the actual cost of blasting. The parties disputed the price term throughout the period of time in which Summers blasted rock on the project. As evidenced by the numerous communications going back and forth between Summers and Bemis, they could never reach an agreement on the price term.

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[34] *Beck v. Reynolds*, 903 P.2d 317 (Okla. 1995); *Hampton v. Surety Development Corp.*, 817 P.2d 1273 (Okla. 1991); *Cloud v. Winn*, 303 P.2d 305 (Okla. 1956); *O'Neal v. Harper*, 182 Okla. 52, 75 P.2d 879 (Okla. 1937); 15 OKLA. STAT. ANN. §§ 2, 51.

[35] 15 OKLA. STAT. ANN. § 66.

[36] *O'Neal v. Harper*, 182 Okla. 52, 75 P.2d 879 (Okla. 1937).

In *O'Neal v. Harper*[37] the Supreme Court of Oklahoma was faced with a similar dispute over the sale of an oil and gas royalty interest. The plaintiff alleged that she agreed to sell the royalty interest for $110 but the defendant intended to pay and tendered the sum of $55 when the royalty deed was delivered. The trial court's finding that the purchase price was $110 was against the clear weight of the evidence.

> [The trial court's] conclusion appears to be that the minds of the parties met on the subject of the contract, that is, the sale of this particular interest, but 'there might be some misunderstanding as to the purchase price.' . . . The purchase price was a material part of the contract and it is necessary that there be a meeting of the minds on the amount thereof before a valid contract could exist. It is not enough that plaintiff intended to sell this particular royalty interest and that defendant intended to buy it. [citations omitted].[38]

So too, here, Summers and Bemis agreed that Summers would perform the blasting work on this road construction project. However, this was not enough. Summers and Bemis never had a meeting of the minds as to the price Summers would be paid for his blasting services. Thus, no contract ever existed.

Moreover, the parties never reached agreement on the quantity term. Although the parties agreed that the disputed price was per cubic yard, there was never a meeting of the minds how the quantity term would be measured. Summers intended that he be paid on the cubic yards of rock "blasted," while Bemis intended to pay based upon the amount of cubic yards "removed" or hauled from the job site. The parties could not even agree on the method of measurement. Summers claimed the quantity would be determined from his blasting reports while Bemis claimed the quantity would be measured using the final cross-sections prepared by ODOT. These differences result in a rather large disparity in the quantity term; Bemis calculates 174,907 cubic yards of rock removed while Summers calculates 237,872 cubic yards of rock

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[37] 182 Okla. 52, 75 P.2d 879 (1937)

[38] *Id.* at 881.

blasted. The quantity term was also an essential term of the blasting contract.[39] There was no meeting of minds on the quantity term and therefore, no contract.

Summers failed to carry his burden to prove that there was a meeting of the minds between Summers and Bemis regarding essential terms of an express contract and therefore, no contract exists. But the absence of a contract does not, by itself, deny Summers a remedy. Where there is no express contract, the rule of quantum meruit may apply.[40] Quantum meruit implies an agreement to pay what is reasonable.[41] As above, Summers had the burden of proving what a reasonable price for his work should have been.

The credible testimony of Summers proves the value of his services in this case. Although he failed to prove the existence of a contract, the Court can conclude on the record before it that Summers essentially acted as a consultant in this case. He assumed no responsibility to provide supplies, materials, payroll or insurance. All of the personnel under his supervision were paid and insured by Bemis. Summers received daily blasting reports as well as video of the activities of the blasters. He laid out where the blasting would occur and, via telephone or occasionally on the site, he directed the blasting enterprise. Based on these facts, the Court concludes that Summers intended to "sell" and Bemis intended to "purchase," his services, measured by cubic yards at a fixed rate. Given that Summers consulted from a

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[39] *See T'ai Corp. v. Kalso Systemet, Inc.*, 568 F.2d 145 (10th Cir. 1977) (quantity is an essential term.)

[40] *Brown v. Wrightsman*, 175 Okla. 189, 51 P.2d 761 (Okla. 1935); *Martin v. Buckman*, 883 P.2d 185 (Okla. App. 1994) (quantum meruit ordinarily is not applicable if contract specifies the amount to be paid for services)

[41] *Martin v. Buckman*, 883 P.2d 185 (Okla. App. 1994) (Common law doctrine of "quantum meruit" is founded on Latin phrase meaning "as much as he deserves," and refers to legal action grounded on promise that defendant would pay to plaintiff for his services); *Wickham v. Belveal*, 386 P.2d 315, 318 (Okla. 1963) (Performance and acceptance of services constitute a sufficient consideration to support a promise implied in law to pay for them).

distance of some 250 miles, it would be unreasonable to conclude that he assumed the risk inherent in accepting what was left in a $2.48 per cubic yard contract after payment of all expenses, particularly when Summers had absolutely no control over those expenses, other than in the selection of his blasting team. In all of Summers's discussions with Bemis before commencing the work, his services were quoted at $.50 per cubic yard. Bemis accepted his services for the duration of the project knowing this was the rate Summers intended to charge. Only after the services were completed and Bemis reneged on its payment obligations did Summers, in an attempt to secure some payment for his efforts, come off of the $.50 price. Accordingly, this Court concludes that the value of Summers's consulting services, irrespective of Bemis actual costs in executing the job, is $.50 per cubic yard.

Further, the Court concludes that Summers's quantity term (237,872 cubic yards) is the more appropriate quantity in the absence of an agreement between the parties and applying the theory of quantum meruit. In making a quantum meruit determination, the Court must examine the nature of the services rendered by Summers in order to determine reasonable compensation. Bemis hired Summers to blast rock on this project; Bemis did not hire Summers solely to remove or haul rock or dirt from the job site. Blasting rock was the essence of the service and work performed by Summers. Accordingly, the Court concludes that Summers should be reasonably compensated for providing blasting services and uses the cubic yards of rock blasted as determined by Summers's blasting reports as the quantity term.

The calculations using the above price and quantity term results in a total price of $118,936 (237,872 cubic yards x $.50 = $118,936). Bemis has previously paid Summers a total of $57,856.00. Accordingly, Summers is entitled to additional compensation under quantum meruit and his claim against the bankruptcy estate is ALLOWED in the amount of $61,080.00

Mid Continent's Summary Judgment Motion

Curiously, Mid-Continent has filed a motion for summary judgment against *Summers* in Bemis' bankruptcy case. It has filed this motion without even commencing an adversary proceeding or otherwise legitimately invoking this Court's jurisdiction. Mid Continent does not challenge Summers's proof of claim against the bankruptcy estate[42] but seeks a determination from the bankruptcy court that Mid Continent, as surety, has no liability to Summers under the bond. Mid Continent contends primarily that Summers has not timely commenced an *action* within one year from the date work was last performed and is therefore not entitled to recover under the bond.[43] While Summers has made a *claim* against the bond, there is no evidence in the record that Summers has filed a lawsuit against Mid Continent or that an *action* on the bond is pending in any court.[44]

Bankruptcy Courts are courts whose jurisdiction is strictly proscribed by the Constitution, and Title 28 of the United States Code. Bankruptcy jurisdiction is essentially derived from the jurisdictional warrant of the District Courts, in whom original jurisdiction of cases and proceedings arising in, under, or related to Title 11 is vested.[45] This Court's power and authority to hear those disputes is by virtue of a

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[42] In its summary judgment papers Mid Continent states its "motion is without prejudice to Summers' unsecured claim against the bankruptcy estate."

[43] Mid Continent also asserts that the bankruptcy automatic stay did not prevent Summers from filing an action against Mid Continent on the bond, and that Summers' work was not covered by the bond because his "consulting" services were not performed at the job site. As noted previously in the facts, Mid Continent opposed Summers' stay relief motion and effort to pursue its action against Mid Continent on the bond.

[44] *See* Mid Continent Ex. E.

[45] 28 U.S.C. § 1334(a) and (b).

discretionary referral of bankruptcy cases and proceedings by the District Court to it.[46] As clearly set out in Article III, Section 2 of the Constitution, the judicial power of the United States extends to "Cases, in Law and Equity. . ." and "Controversies." As this jurisdictional limitation applies to the Supreme Court as well as "such inferior Courts as the Congress may from time to time establish,"[47] the jurisdiction of the Bankruptcy Court can hardly be broader than that of its referring Court, the District Court.

In its haste to obtain from this Court some sort of preclusive ruling which would no doubt smooth its path in any anticipated state court bond litigation brought by Summers in the future, Mid Continent has overlooked the clear absence of a case or controversy between itself and Summers either here or in state court. Rather than await Summers's next move in an appropriate forum, Mid Continent seeks an advisory opinion here.

Even if such an opinion were permissible, and notwithstanding the parties having consented to this Court's exercise of jurisdiction and entry of a final judgment, the Court is required on its own to examine its jurisdiction.[48] Any prospective action by Summers against Mid Continent on the bond involves questions of contract law and in this case, Oklahoma state law. This is a pure *Marathon*[49] type claim over which this Court lacks jurisdiction.[50] Case law indicates that a proceeding is not "core" where it does not invoke

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[46] 28 U.S.C. § 157(a) and (b).

[47] U.S. Const., Article III, Sec. 1.

[48] *See* Dkt. 495, Final Pretrial Conference Order, p. 2; 28 U.S.C. § 157(b)(3).

[49] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed. 2d 598 (1982).

[50] *See In re Shafer & Miller Industries, Inc.*, 66 B.R. 578, 581 (S.D. Fla. 1986) (Under *Marathon*, debtor-contractor's breach of contract action against Wausau Insurance, which provided the performance bond on construction project, was "related to" proceeding and not a core proceeding

any substantive right created by federal bankruptcy law and it is based on a cause of action that could be brought in a forum other than bankruptcy court.[51] The Court concludes that Mid Continent's summary judgment motion and any action by Summers against Mid Continent on the bond are non-core. This is particularly so where both Summers and Mid Continent are nondebtor parties in this bankruptcy.

In *Safeco Insurance Company of America v. Farmland Industries, Inc., et al (In re Farmland Industries, Inc.)*[52] a similar fact pattern was presented. In that case, Safeco Insurance had issued a performance bond on the debtor-principal's behalf to assure regulatory obligations owed by debtor or its subsidiaries to the Federal Highway Administration. Safeco filed an adversary proceeding for declaratory judgment and interpleader regarding the rights of debtor and other nondebtor parties and claimants under the bond. The bankruptcy court held that it lacked subject matter jurisdiction over Safeco's action against the nondebtor claimants, the proceeding being neither core nor related to Farmland's bankruptcy.[53]

> This Court is persuaded by the sound reasoning of *S & M Constructors*, and determines that although the factual situation is slightly different here in that Safeco has filed an action against the Other Defendants . . . Safeco's action for declaratory relief and interpleader by which Safeco requests, in relevant part, that the Court determine the rights of the Other Defendants under the Bond, is merely a precursor to a potential indemnification claim against Farmland. By means of this adversary proceeding, Safeco is attempting to compress into one step the two-step process of first determining whether Safeco is liable to the Other Defendants under the bond and then, if so, whether Farmland must indemnify Safeco. Judge Federman in *S & M Constructors* . . . determined that a bankruptcy court does not have subject matter jurisdiction over the first step in the process

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under 11 U.S.C. § 157(b)(2)(O).).

[51] *In re Gardener* 913 F.2d 1515, 1518 (10th Cir. 1990); *In re BNI Telecommunications, Inc.*, 246 B.R. 845 (6th Cir. BAP 2000).

[52] 291 B.R. 489 (Bankr. W.D. Mo. 2003).

[53] *Id.* at 495-98, adopting the reasoning of *The Foley Company v. Aetna Casualty & Surety Co. (In re S & M Constructors, Inc.)*, 144 B.R. 855, 858-62 (Bankr. W.D. Mo. 1992).

> by which the surety's liability to the obligee under a bond is established, and the undersigned heartily agrees. Accordingly, Safeco must bring its cause of action against the Other Defendants in a proper forum.[54]

The Court concludes that *Farmland Industries* is virtually on all fours with the case at bar and Mid Continent's summary judgment motion presented here. On the basis of *Farmland Industries* and the analysis of *S & M Constructors*[55] adopted therein, this Court concludes that it likewise lacks subject matter jurisdiction over Mid Continent's summary judgment motion.[56] It is neither a core proceeding[57] nor a "related to" proceeding.[58]

Even if Mid Continent's summary judgment motion and Summers's potential action on the bond were construed as a "related to" proceeding, the Court's power is limited.[59] Moreover, the Court may exercise its discretion and abstain from hearing a "related to" proceeding.[60] The Court is not persuaded

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[54] *Id.* at 498.

[55] *The Foley Company v. Aetna Casualty & Surety Co. (In re S & M Constructors, Inc.)*, 144 B.R. 855, 858-62 (Bankr. W.D. Mo. 1992) (Bankruptcy court had neither core nor related to jurisdiction over nondebtor general contractor's action against nondebtor surety Aetna under payment and performance bonds for chapter 11 debtor-subcontractor's failure to complete work on construction project.)

[56] 28 U.S.C. § 1334(b).

[57] 28 U.S.C. § 157(b)(2).

[58] 28 U.S.C. § 157(c).

[59] *See* 28 U.S.C. § 157(c)(1) (The bankruptcy court's power is limited to making a recommendation to the district court, in the absence of consent to a final order by the parties.); *In re Gardner*, 913 F.2d at 1518, *citing In re Colorado Energy Supply, Inc.*, 728 F.2d 1283 (10th Cir. 1984) ("Related" proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court.)

[60] *See* 28 U.S.C. § 1334(c)(1); *In re Midgard Corp.*, 204 B.R. 764 (10th Cir. BAP 1997) (discussing factors for mandatory abstention under § 1334(c)(2)). Because no action is currently pending between Summers and Mid Continent on the bond, the Court is not required to abstain from

that determining Mid Continent's summary judgment motion, or Summers's potential action against Mid Continent is an appropriate exercise of this Court's "related to" jurisdiction. It would be premature for this Court to rule on the validity of an action that has not even been commenced. Since there is no pending action between Summers and Mid Continent, Mid Continent can only be seeking an advisory opinion on its anticipated defense to a potential action on the bond. If and when Summers commences an action against Mid Continent in Oklahoma state court to pursue its claim under the bond, and if Mid Continent believes the action to be time-barred under the bond or Oklahoma law, it can file a motion to dismiss or a motion for summary judgment in the appropriate forum.

This Court is troubled not only by Mid Continent's blatant disregard for a fundamental premise of federal jurisdiction, but also by Mid Continent's disingenuous conduct with respect to Summers and his attempt to collect. As noted above, Mid Continent was in communication with Summers throughout the Spring of 2003, after erroneously advising him in January of that year that his claim period had expired. In all of those communications, Mid Continent's representatives never advised him of the revised bar date of June 2, 2003 or that what he had submitted in support of his claim to the bonding company was insufficient in any way. Only on August 5, 2003, after remaining silent until the bar date passed, did Mid Continent deny his claim on the basis of the statutory bar. Mid Continent compounded this delay by opposing Summers's stay relief motion in October of 2003 and then advising this Court at a status conference on January 13, 2004 that the motion had been denied, an assertion clearly contradicted by this Court's docket. Finally, Mid Continent wilfully added work and expense to this already-complicated case by filing this gratuitous and baseless motion. Having no jurisdiction of the Summers – Mid Continent

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exercising jurisdiction. *See also, In re Shafer & Miller Industries, Inc.*, 66 B.R. 578, 581 (S.D. Fla. 1986) (Bankruptcy court need not retain the matter for trial, but may defer to the district court.).

dispute, this Court leaves to the Oklahoma courts the determination whether Mid Continent's conduct in connection with this matter was inequitable or merely disreputable.

For all of the foregoing reasons, the Court concludes that it lacks subject matter jurisdiction over Mid Continent's summary judgment motion and would in any event, decline to exercise "related to" jurisdiction over the Mid Continent-Summers bond dispute. Summers is not stayed by Bemis' bankruptcy from commencing an action against Mid Continent on the bond[61] and to the extent Summers has delayed in commencing an action due to the bankruptcy automatic stay, the stay is lifted so that Summers or Mid Continent may proceed forward with their dispute in an appropriate forum. Summers's counsel will prepare and submit an order GRANTING his motion for relief from stay. Mid Continent's summary judgment motion is DISMISSED for lack of jurisdiction.

IT IS SO ORDERED.

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[61] *See In re S & M Constructors, Inc.*, 144 B.R.at 862-63 (Bankr. W.D. Mo. 1992) (Where chapter 11 debtor was subcontractor on construction project, automatic stay did not preclude nondebtor general contractor's suit against nondebtor surety on payment and performance bond).